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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

FRANK CLARKE, *et al.*,
Petitioners,
v.
CITY OF CINCINNATI, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

TRUDY D. RAUH
LAUFMAN, RAUH & GERHARDSTEIN
1409 Enquirer Building
617 Vine Street
Cincinnati, Ohio 45202
(513) 621-9100

ROBERT E. MONTGOMERY, JR.*
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
1615 L Street, N.W.
Suite 1300
Washington, D.C. 20036
(202) 223-7330

BARBARA A. ARNWINE
THOMAS J. HENDERSON
BRENDA WRIGHT
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1450 G Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 662-8600
Counsel for Petitioners

* Counsel of Record

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REPLY BRIEF FOR PETITIONERS

The Petitioners submit this brief in reply to certain points made in the Respondents' opposition. As noted in the Petition, certiorari is appropriate in this case for several reasons, including the need to resolve conflicts among the circuits regarding (a) the role of the concept of proportionality in a Section 2 challenge to an at-large electoral system, and (b) the extent to which referendum-based electoral systems are subject to scrutiny under the Fourteenth and Fifteenth Amendments to the Constitution.

I. RESPONDENTS' BRIEF SERIOUSLY DISTORTS THE RECORD IN THIS CASE.

Respondents' Statement of the Case is riddled with factual errors and material omissions, as symptomized by the total absence of citations. For purposes of this Reply,

we will address only four of Respondents' most egregious distortions of the record:

First, Respondents contend that "[v]oting in Council elections appears to have varied [only] slightly along racial lines" and "[b]lack and white voters . . . have shared more similarities than differences in the candidates they support." (R.Br. at 4.) Respondents' attempt to minimize the fact of racial polarization in Cincinnati politics is belied by the District Court's factual findings that:

—black voters in Cincinnati are politically cohesive, in that they generally vote for the same candidates and, assuming equal qualifications, would prefer a black over a white candidate (App. 34a-35a);

—in all but one of the elections studied, black voters voted to elect three black candidates, while "[w]hite voters have never included more than one African American candidate among their top nine choices" (App. 35a);

—only one of the many black candidates for council from 1981 to 1991 received a majority of the white vote (App. 36a), and that candidate was a conservative Republican incumbent who, in relative terms, received less support from black than white voters (App. 36a).

Second, Respondents maintain that "experts for both sides . . . defined the preferred candidates of black voters to be the nine candidates receiving the highest vote in the field of candidates." (R.Br. at 16.) Respondents' assertion that neither Respondents' nor Petitioners' expert witnesses questioned a race-blind definition of "preferred candidate" misrepresents the record. In fact, the report submitted by Respondents' expert witness, Dr. Alfred Tuchfarber, lists six possible definitions of "preferred candidate." The first four of those definitions included only black candidates.[1] (R.87: DX CCC at 5). Petitioners'

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[1] Dr. Tuchfarber admitted that under the 9X system "you have candidates that don't have to be overly concerned about the black

expert witness, Dr. Richard Engstrom, clearly rejected a race-blind legal definition of "preferred candidate." Although he referred to black voters' top nine choices as "preferred candidates," he nevertheless stressed that, when black voters can elect candidates only when those candidates are white, the opportunity to elect candidates of choice is not equal, and vote dilution is present. (R.96: Tr.II at 189-190.)[2]

Third, Respondents improperly attempt to expand the record to include the results of the November 1993 council election, which was not considered by either the District Court or the Sixth Circuit. (R.Br. at 6.) As this Court knows full well, even if such results were a part of the record of this case, the election of minority candidates after the initiation of voting rights litigation is not probative evidence of equal electoral opportunity. *Gingles v. Edmiston*, 590 F. Supp. 345, 367 n.27 (E.D.N.C. 1984) (three-judge court), *aff'd in rel. part, rev'd in part sub nom. Thornburg v. Gingles*; *see Collins v. City of Norfolk*, 883 F.2d 1232, 1241-43 (4th Cir. 1989), *cert. denied*, 493 U.S. 1068 (1990); *Zimmer v. McKeithen*, 485 F.2d 129, 1307 (5th Cir. 1973) (en banc), *aff'd sub nom. East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976).

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electorate." He stated that this was "especially true for the Republicans who don't get a great deal of the black vote." (R. 87: PX 192; R.104: Tr. IX at 1659).

[2] Petitioners do not contend that white candidates can never be the preferred candidates of black voters. Dr. Engstrom testified, however, that the election of certain white candidates with black support did not negate the existence of vote dilution. He emphasized that blacks had no choice but to vote for some white candidates, since each voter had nine votes to cast and only three or four black candidates ran in most elections. (R.97: Tr. III at 403). Dr. Engstrom also explained how the 9X system discourages black candidates from running. (R.96: Tr. II at 215; R.97: Tr. III at 404). In effect therefore, only three or four of the nine seats on Council can be characterized as involving black/white electoral contests.

Fourth, Respondents cite a passage in the Senate Report referring to a 1978 Justice Department study which concluded that the Department "did not discover the facts necessary to institute a [vote dilution] lawsuit" as evidence that Congress did not intend that Section 2 be applied to invalidate Cincinnati's 9X system.[3] Respondents' misguided attempt to trump the ample record evidence of vote dilution with legislative history "hearsay" [4] overlooks the critical fact that the period preceding the Justice Department's examination of Cincinnati's electoral system was the only period in the entire 35-year history of 9X in which there were three consecutive elections in which two black candidates were elected. (App. 33a.) Since the black community accounted for only 24% of the city's voting age population in the 1970 census (App. 32a), the election results available to the Justice Department at the time of its study would have suggested that the City's black voters had achieved virtual proportional representation under 9X (2 of 9). The results of the subsequent elections which were considered by the District Court in this case were dramatically different, and clearly demonstrate that the conclusion allegedly reached in the Justice Department's study is irrelevant.

II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THE FOURTH CIRCUIT'S DECISION IN *COLLINS v. NORFOLK*.[5]

Notwithstanding the Sixth Circuit's explicit recognition that its vote dilution analysis was at odds with the ap-

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[3] The Sixth Circuit noted this passage in connection with its conclusion that the trial court's ruling was not clearly erroneous, but incorrectly characterized the Justice Department's conclusion as an affirmative finding "that 9X did not dilute the voting power of black Cincinnatians." (App. 13a, n.5)

[4] Both the Respondents and the courts below have discussed the 1978 study as though it were a part of the record in this case, which it is not.

[5] *Collins v. City of Norfolk, Va.*, 883 F.2d 1232 (4th Cir. 1989).

proach adopted by the Fourth Circuit in *Collins*, a factually similar case (App. 10a-11a), Respondents contend otherwise. (R.Br. 13-14, 25-26.) Respondents are clearly wrong. They mistakenly focus on the fact that the court in *Collins* did not find it necessary to reach the issue of the legal significance of the candidate's race. (R.Br. at 26.) This issue, of course, was the critical point on which the Sixth Circuit found that the trial court had committed legal error. (App. 6a-9a.)[6] That issue is not, however, the focus of the conflict which has arisen between the two circuits.

As the Sixth Circuit recognized, once a determination has been made concerning the identity of the minority's "preferred candidates," the court must determine whether the majority bloc vote is sufficient to deny the minority an equal opportunity to elect those candidates. The *Collins* court was able to identify the minority's preferred candidates without deciding whether their race was relevant. The Sixth Circuit, however, determined that the trial court in this case, after making factual findings that Cincinnati's black voters had consistently voted to elect three *black* council members, had erred in refusing to consider the race of the candidate.[7] Rather than simply reverse, however, the Sixth Circuit decided to make its own determination regarding the legal significance of white bloc voting with respect to black voters' preferred black candidates. (App. 9a.)

It was the Sixth Circuit's conscious rejection of the *Collins* approach to this analysis—not the issue of the candidate's race—which created a fundamental conflict

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[6] Respondents' contention that the Sixth Circuit did not find legal error on this point is incomprehensible. (R.Br. at 13.)

[7] These and other factual findings by the trial court showing black voters' clear preference for black candidates clearly distinguish this case from one involving the kind of "racial stereotypes" which concerned this Court in *Shaw v. Reno*, —— U.S. ——, 113 S.Ct. 2816 (1993).

between the circuits which only this Court can resolve. The essence of that conflict is the disparate treatment which the Sixth and Fourth circuits have afforded to the concept of proportionality.[8] Whereas the *Collins* court held that the inquiry into whether white bloc voting can usually defeat minority-preferred candidates should focus on the black community's effort to obtain a *second* seat (*Collins, supra*, 883 at 1240), the Court of Appeals in this case rejected such a focus on the ground that "it has no stopping point short of guaranteed proportional representation for racial minorities." (App.10a.) This Court has clearly suggested in a closely related context that the Sixth Circuit is wrong, and that "lack of proportionality is probative evidence of vote dilution," *Johnson v. DeGrandy*, 114 S.Ct. 2647, 2664 (1994) (O'Connor, J., concurring in the judgment).

The Court should grant certiorari in this case in order to insure that the circuits will consistently apply Section 2 in future at-large vote dilution cases.

III. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THE FIFTH CIRCUIT'S DECISION IN *KIRKSEY v. CITY OF JACKSON*.[9]

Respondents deny that the Fifth Circuit has rejected the limitation on judicial scrutiny of facially neutral referenda which the Sixth Circuit adopted in *Arthur v. City of Toledo*, 782 F.2d 565 (1986), and reaffirmed in this case. While apparently conceding that *Kirksey* would allow the examination of "evidence, direct or circumstantial," bearing on the electorate's motives "in a proper case," Respondents insist that the Fifth Circuit

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[8] As noted in the Petition, the Sixth Circuit's treatment of this issue is also in conflict with that of the Seventh Circuit. *See Barnett v. Daley*, 32 F.3d 1196, 1201-03 (7th Cir. 1994).

[9] *Kirksey v. City of Jackson*, 669 F.2d 316 (5th Cir. 1982). As noted in the Petition, the Sixth Circuit's ruling is also in conflict with *Kendrick v. Walder*, 527 F.2d 44 (7th Cir. 1975).

limited such "proper case" to instances in which "racial discrimination was the only possible motivation behind the referendum results." (R.Br. at 26-27)

Although such alleged limitation is conspicuously absent from the *Kirksey* opinion, Respondents claim to have found it in the three decisions of this Court upon which the Fifth Circuit relied. Such a reading of *Kirksey* makes no sense, for two reasons: First, the three decisions cited (*Hunter v. Erickson*, 393 U.S. 385 (1969); *Reitman v. Mulkey*, 387 U.S. 369 (1967); and *Lucas v. Colorado General Assembly*, 377 U.S. 713 (1964)) were not relied on by the *Kirksey* court as *examples* of referenda which met the "proper case" test, but as instructive precedents for the Fifth Circuit's overarching holding that referenda are not exempt from constitutional scrutiny. The only limitation that *Kirksey*—unlike *Arthur*—places on such scrutiny is the one expressly stated: "an individual voter may not be subjected to judicial examination concerning how he voted or why he personally voted in that fashion." *Kirksey*, 669 F.2d at 316.

To argue, as Respondents do, that *Kirksey*'s holding is implicitly applicable only to situations in which "racial discrimination was the only possible motivation behind the referendum results" (R.Br. at 27) is to ignore both logic and the *Kirksey* facts. As this Court has recognized, it "would nearly always be true" that laws regarding an entire electoral system will be "readily explainable on grounds apart from race." *Mobile v. Bolden*, 446 U.S. 55, 70 (1980). Nothing in the Fifth Circuit's decision even remotely suggests an intention to exempt virtually all referenda-based electoral systems from constitutional review.

Moreover, the very facts of *Kirksey* belie Respondent's argument. The referendum challenged in that case, adopting a mayor-commission form of government, was neither facially discriminatory nor a measure for which only those motivated by race would vote. While the trial

court declined to engage in an examination of the motives of individual voters [10], it did conduct precisely the type of general inquiry into the electorate's motivation, based on indirect and circumstantial evidence, that the Sixth Circuit's ruling prohibits.[11] It was on the basis of such inquiry that the trial court was able to conclude: "Thus, this Court finds that race was not a motivating factor in . . . the adoption of the commission form of government with at-large voting by the electorate of Jackson in 1912." *Kirksey*, 506 Fed. Supp. 491, 502. The Fifth Circuit clearly acknowledged and endorsed this analysis when it held that "the record in the case before us does not establish [constitutional] abuse of the electoral process." *Kirksey*, 669 F.2d 316, 317.

The existence of a conflict among the circuits on this issue of increasing national importance warrants a grant of certiorari in this case.

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[10] *Kirksey v. City of Jackson*, 506 F. Supp. 491, 498-500, *aff'd*, 663 F.2d 659 (5th Cir. 1981), *reh'g den., clarified*, 669 F.2d 316 (5th Cir. 1982).

[11] *Id. Kirksey*, 560 F. Supp. at 500-02.

CONCLUSION

For reasons stated in our Petition, as well as in this Reply, the petition for a writ of certiorari should be granted.

Respectfully submitted,

TRUDY D. RAUH
LAUFMAN, RAUH & GERHARDSTEIN
1409 Enquirer Building
617 Vine Street
Cincinnati, Ohio 45202
(513) 621-9100

ROBERT E. MONTGOMERY, JR.*
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
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Counsel for Petitioners

* Counsel of Record